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No. 03-1040

In The

Supreme Court of the United States

WASHINGTON STATE GRANGE,
TERRY HUNT and JANE HODDE,

Petitioners,

v.

WASHINGTON STATE DEMOCRATIC PARTY, et al.,
REPUBLICAN COMMITTEE OF WASHINGTON, et al.,
LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,
and SAM REED, as SECRETARY OF STATE
of the STATE OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

LIBERTARIAN PARTY'S OPPOSITION TO THE GRANGE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Washington State "blanket primary" is part of that state's election system for partisan public offices. Any candidate may self-designate himself or herself as affiliated with any "major" political party to run in the blanket primary as a candidate of that party. However, a candidate who wishes to affiliate with a "minor" political party must first be nominated at that party's nominating convention before appearing on the blanket primary ballot. In the blanket primary election any voter may vote for any candidate regardless of political party affiliation of either the voter or the candidate. Candidates who win at least 1% of the total vote plus a plurality of votes for their designated political party advance to the general election.

The Libertarian Party of Washington State, historically a "minor" political party under Washington law, became a "major" political party for the first time in 2000 when three of its candidates for statewide office obtained more than 5% of the popular vote in the general election. In consequence the Libertarian Party of Washington became subject to the rules of nomination for "major" political parties and lost its ability to nominate its candidates by convention.

Should the Libertarian Party of Washington's moderate ballot success permit the State of Washington to deprive the Libertarian Party of basic freedoms of expression and association by forcing it to accept candidates who are not party members or supported by the party as its standard bearers and allow voters who did not previously support party candidates to participate in selecting its nominees, in violation of the principles set forth in *California Democratic Party v. Jones*, 530 U.S. 567 (2000)?

PARTIES

Insofar as the Libertarian Party understands, the Petition correctly identified the parties to the proceedings below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISION IN THIS CASE	1
WASHINGTON STATE STATUTES IN THIS CASE	1
STATEMENT	5
THE LIBERTARIAN PARTY EXPERIENCE	5
PROCEEDINGS BELOW	7
MISSTATEMENTS IN THE PETITION	10
REASONS FOR DENYING THE WRIT	12
THE GRANGE HAS NO STANDING TO RAISE ANY BALLOT ACCESS CLAIMS RELATED TO SMALLER PARTIES	12
THERE IS NO CONFLICT WITH THIS COURT OR WITHIN THE NINTH CIRCUIT	14
THIS CASE DOES NOT PUT THE FUTURE OF OPEN PRIMARIES IN DOUBT	15
RES JUDICATA DOES NOT APPLY TO THE LIBERTARIAN PARTY	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Milliken, 59 P.2d 295 (WA 1936) 16

Arizona Libertarian Party, Inc. v. Bayless, 351 F.3d 1277 (C.A.9 2003) 14, 15

California Democratic Party v. Jones, 530 U.S. 567 (2000) ..... *passim*

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948) 18

Democratic Party Of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 17

Democratic Party of Washington State v. Reed, 343 F.3d 1198 (C.A.9 2003) ..... *passim*

Eu v. San Francisco Democratic Comm., 489 U.S. 214 (1989) 17

Heavey v. Chapman, 611 P.2d 1256 (WA 1980) 16, 17

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992) 13

Montana v. U. S., 440 U.S. 147, 99 S.Ct. 970 (1979) 17

Munro v. Socialist Worker's Party, 479 U.S. 189 (1986) 6, 13

Nader v. Schafer, 417 F.Supp. 837 (D.Conn. 1976), summarily aff'd, 429 U.S. 989 (1976) 13

Nevada v. U.S., 463 U.S. 110, 103 S.Ct. 2906 (1983) 16

Ray v. Blair, 343 U.S. 214 (1952) 13

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 8

TABLE OF AUTHORITIES – Continued

Page

Snyder v. Munro, 106 Wash.2d 380, 721 P.2d 962 (1986) 16

Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989) 18

Tashjian v. Republican Party Of Connecticut, 479 U.S. 208 (1986) 17

Texas v. U.S., 523 U.S. 296, 118 S.Ct. 1257 (1998) 12

United States Term Limits, Inc., v. Thornton, 514 U.S. 779 (1995) 15

STATUTES

42 U.S.C. § 1983 ..... 6, 8

R.C.W. § 29.01.090 ..... 1, 6, 11

R.C.W. § 29.01.100 ..... 1, 5, 11, 14

R.C.W. § 29.15.010 ..... 2, 6

R.C.W. § 29.18.010 3

R.C.W. § 29.24.020 ..... 3, 5

R.C.W. § 29.24.030 ..... 4, 6

R.C.W. § 29.30.005 ..... 4, 6

R.C.W. § 29.30.095 ..... 4, 6, 8, 12

R.C.W. § 29.42.010 5

CONSTITUTIONAL PROVISIONS

First Amendment 8

CONSTITUTIONAL PROVISION IN THIS CASE

The Constitution of the United States of America, First Amendment, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.

WASHINGTON STATE STATUTES IN THIS CASE

R.C.W. § 29.01.090 Major political party[1]

"Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year: PROVIDED, That any political party qualifying as a major political party under the previous subsection (2) or subsection (3) of this section prior to its 1977 amendment shall retain such status until after the next state general election following June 30, 1977.

R.C.W. § 29.01.100 Minor political party

"Minor political party" means a political organization other than a major political party.

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[1] This and the other listed sections of Title 29, R.C.W., Elections, have been recodified as sections in new Title 29A, by Washington Laws 2003, ch. 111, effective July 1, 2004.

R.C.W. § 29.15.010 Declaration and affidavit of candidacy

A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration and affidavit of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under R.C.W. § 29.15.050;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in R.C.W. § 29.15.050.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process.

R.C.W. § 29.18.010 Application of chapter

Candidates for the following offices shall be nominated at partisan primaries held pursuant to the provisions of this chapter:

(1) Congressional offices;

(2) All state offices except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise.

R.C.W. § 29.24.020 Nomination by convention or write-in – Dates – Special filing period

(1) Any nomination of a candidate for partisan public office by other than a major political party may be made only: (a) In a convention held not earlier than the last Saturday in June and not later than the first Saturday in July or during any of the seven days immediately preceding the first day for filing declarations of candidacy as fixed in accordance with R.C.W. § 29.68.080; (b) as provided by R.C.W. § 29.62.180; or (c) as otherwise provided in this section.

R.C.W. § 29.24.030 Requirements for validity of convention

(1) To be valid, a convention must be attended by at least twenty-five registered voters.

(2) In order to nominate candidates for the offices of president and vice-president of the United States, United States senator, or any statewide office, a nominating convention shall obtain and submit to the filing officer the signatures of at least two hundred registered voters of the state of Washington. In order to nominate candidates for any other office, a nominating convention shall obtain and submit to the filing officer the signatures of twenty-five persons who are registered to vote in the jurisdiction of the office for which the nominations are made.

R.C.W. § 29.30.005 Names on primary ballot

Except for the candidates for the positions of president and vice-president or for a partisan or nonpartisan office for which no primary is required, the names of all candidates who have filed for nomination under chapter 29.18 R.C.W. and those independent candidates and candidates of minor political parties who have been nominated under chapter 29.24 R.C.W. shall appear on the appropriate ballot at the primary throughout the jurisdiction in which they are to be nominated.

R.C.W. § 29.30.095 Partisan candidates qualified for general election

The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for

that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary.

R.C.W. § 29.42.010 Authority – Generally

Each political party organization shall have the power to:

(1) Make its own rules and regulations;

(2) Call conventions;

(3) Elect delegates to conventions, state and national;

(4) Fill vacancies on the ticket;

(5) Provide for the nomination of presidential electors; and

(6) Perform all functions inherent in such an organization: PROVIDED, That only major political parties shall have the power to designate candidates to appear on the state primary election ballot as provided in R.C.W. § 29.18.150 as now or hereafter amended.

STATEMENT

THE LIBERTARIAN PARTY EXPERIENCE

Political parties are recognized by Washington law and possess the authority to make their own rules and regulations and to perform all functions inherent in a political party. R.C.W. § 29.42.010. Until 2000 the Libertarian Party was a "minor" political party. R.C.W. § 29.01.100. Candidates seeking office as candidates of "minor" political parties must be nominated at a party convention of at least twenty-five voters in order to obtain access to the primary ballot. R.C.W. §§ 29.24.020(1),

29.24.030, 29.30.005, and see, *Munro v. Socialist Worker's Party*, 479 U.S. 189 (1986). Accordingly, until 2000 the Libertarian Party of Washington State nominated its candidates by convention.

In 2000, the Libertarian Party emerged as a "major" political party because three of its nominees for partisan statewide office received at least 5% of the vote in the general election. ER[2] Tab 11, R.C.W. § 29.01.090. Accordingly, and solely because it was moderately successful, the Libertarian Party lost its ability to nominate its candidates by convention and can no longer limit candidates seeking nomination to those who support the Party or who have reasonable Party support. R.C.W. §§ 29.15.010; 29.18.010; 29.30.005.

The primary stock in trade of emerging political parties is their ideology. Voters who vote for emerging political party candidates are attracted to specific programs or principles, not to certain candidates who may be elected; except perhaps in smaller districts. If emerging political parties are unable to bring their particular message to the general election their very purpose of being is in question.

In Washington, the unfettered ability of any candidate to declare affiliation with any "major" political party in the primary election undermines the ability of emerging political parties to formulate and deliver their message to the public once they have crossed the threshold from "minor" political party to "major" political party. The "net

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[2] References to "ER" are references to the Excerpts of Record in the Ninth Circuit.

effect" of the blanket primary is to assure a range of "centrist" candidates, *California Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (hereinafter "*Jones*") which is anathema to the traditional role and function of "minor" and emerging political parties.

Somewhat like the mythological figure Sisyphus, smaller political parties in Washington State who build their ballot strength under the protection of nominating conventions are condemned to watch that ballot strength "roll off" after they emerge as a "major" political party. Imposter candidates[3] can and will obtain automatic access to the primary ballot under the label of the emerging political party, thus disbursing the ballot strength of the party, diluting or redefining its political message and placing its access to the general election ballot at severe risk. Once that ballot strength is disbursed the political party will have to work to build it once again, only to have it disbursed once again by a new set of imposter candidates. If the Libertarian Party is to break that cycle it must have the freedom to determine who will speak on its behalf, and when.

PROCEEDINGS BELOW

This case originated after this court's decision in *Jones* when the Democratic Party of Washington, joined shortly by the Republican State Committee of Washington,

[3] The Libertarian Party uses the term "imposter candidate" to refer to any candidate who claims affiliation with a political party, but whom the political party does not recognize as a party member or to have significant party support in the candidacy.

challenged Washington State's "blanket primary" under 42 U.S.C. § 1983. The Libertarian Party of Washington State intervened as a plaintiff after the 2000 general election. The Washington State Grange intervened to defend the blanket primary.

Throughout the proceedings the Libertarian Party's principal First Amendment contention has been its inability as a "major political party" to determine the qualifications of candidates who may seek nomination using the Libertarian Party label. [ER Tab 11]. In addition the Libertarian Party is still small enough to be concerned with its ballot access rights and wanted to be in a position to protect those rights if any injunctive relief resulted from invalidation of the blanket primary.[4]

In connection with cross-motions for summary judgment, John Mills, one of the individual plaintiffs and then Libertarian Party Chairman, made the unchallenged declaration that "forced acceptance of persons declaring their affiliation with the Libertarian Party as candidates under the Libertarian Party name without a corresponding requirement that the candidate endorse the non-initiation of force statement required of all Party members could lead to wholesale redefinition of the party's message." ER 0191-92. In addition, the Libertarian Party

[4] Washington currently requires all candidates who wish to appear on the general election ballot, regardless of status as "major" or "minor" party candidates, to first obtain at least one percent of the popular vote in the blanket primary. R.C.W. § 29.30.095. Depending upon its terms, an injunction against the blanket primary could affect the application of this so-called 1% rule and thus general election ballot access for minor party candidates.

offered a declaration from a Reform Party of Washington member that the Reform Party of Washington lost its access to the general election ballot and its status as a "major political party" in 1998 because imposter candidates dispersed the Reform Party's meager ballot strength. ER 1224-1226.

The district court ignored this evidence and the State's own evidence that demonstrated the blanket primary placed severe burdens on political party rights. See, e.g., ER 1024-25, 1072. Instead, the district court found that "the political parties" had not offered any admissible evidence of harm and dismissed the suit [ER Tab 62].

The political parties appealed to the Ninth Circuit. Finding that the Washington scheme is materially indistinguishable from the California scheme invalidated in *Jones,* the Ninth Circuit applied strict scrutiny, and finding no substantial balancing state interest, reversed. *Democratic Party of Washington State v. Reed,* 343 F.3d 1198 (C.A.9 2003). Dismissing State arguments that Washington was materially different than California because it does not register voters by party and winners of the primary are allegedly the nominees the electorate, not the parties, the court said that was the problem with the system, not a defense of it.[5]

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[5] "That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them. The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party." *Reed*, 343 F.3d at 1203-4.

At the same time the Ninth Circuit dismissed the Washington State Grange arguments, one of which is pertinent here. The Grange had argued that Grange members' rights to advance their rural and farming agenda within each of the political parties would suffer if each Granger is forced to choose a party ballot. Rejecting this argument, the *Reed* court said:

> "The members of the Grange have a First Amendment right to control its membership and message so that it is not swamped by new members with some urban or foreign policy agenda. Likewise, the people in the Democratic, Republican, and Libertarian Parties have First Amendment rights to control their nominating processes so that they are not controlled by Grangers. . . . The remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message." 343 F.3d at 1206-7.

An alternative course for the Grange to advance its interests is to return to its populist roots, form its own political party and stop trying to play the puppeteer. It is wholly improper for the Grange to attempt to hijack the existing political parties into doing its bidding.

MISSTATEMENTS IN THE PETITION

a. "Major" political parties in Washington State.

The petition states incorrectly that "The Libertarians were 'major' parties (sic) below because one candidate polled over five percent in the preceding election (Wash.

Rev. Code § 29.01.090) but historically Washington has had only two major parties." Petition, at 5, n.6

Three candidates of the Libertarian Party, not one, polled over five percent in statewide races in the 2000 general election, thus rendering the Libertarian Party a "major" political party. ER Tab 11; R.C.W. § 29.01.100.

At least one candidate for the Reform Party of Washington polled more than five percent in the 1996 election, thus making the Reform Party a "major" political party for the 1998 election cycle. Unfortunately there was only one statewide race in Washington State in 1998, for United States Senator. Imposter candidates in that race disbursed the Reform Party's ballot strength and consequently the Reform Party lost its "major" political party ballot status. ER 1224-1226.

Official abstracts reveal before the blanket primary was adopted Washington State's "Progressive Party" and "Socialist Party" would have qualified as "major" political parties under R.C.W. § 29.01.100. In 1912, for example, Mr. Robert Hodge, the Progressive candidate for Washington State Governor received 77,792 out of 317,359 votes, or 25% of the total. Ms. Anna Maley, the Socialist candidate for Governor, received 37,155 votes, or 12% of the total. In 1914, Mr. Ole Hanson, the Progressive candidate for U.S. Senate, received 83,282 of 345,234 votes cast, or 24% of the total.

b. *Reed's* interpretation of *Jones*

The petition states incorrectly: "The Panel concluded that this Court's California Demo. Party invalidated any

primary system which does not restrict voters to candidates from a single party. . . . " Petition, at 10.

The panel found that *Jones* "carefully distinguishes blanket primaries," from open, closed and nonpartisan primary systems, *Reed*, 343 F.3d at 1203, and made no finding or suggestion that *Jones* applied to any system other than blanket primaries.

REASONS FOR DENYING THE WRIT

THE GRANGE HAS NO STANDING TO RAISE ANY BALLOT ACCESS CLAIMS RELATED TO SMALLER PARTIES

Pointing to the favorable review this court gave to Washington's "minor" political party ballot access requirements in *Munro*, the Grange laments the difficulty minor party and independent candidates will face if forced to seek 1% of the primary vote, see, R.C.W. § 29.30.095, when the blanket primary is abandoned and separate party ballots are used. Petition at 12, n.13. This argument is wholly speculative since Washington's legislature will have to adopt a new nominating system to replace the blanket primary and the new system may or may not have the 1% requirement referred to by the Grange. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. U.S.*, 523 U.S. 296, 300, 118 S.Ct. 1257 (1998) (citations omitted) (internal quotations omitted).

Moreover, the Grange is not and does not represent itself as a minor political party or independent candidate. Accordingly, the Grange does not have standing to make

claims on behalf of "minor" political parties or independent candidates. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992).

While seeking self-proclaimed status as champion of minor political parties, the Grange ignores the severe burden the current blanket primary system places upon the Libertarian Party as it emerges from "minor" to "major" party status. The blanket primary deprives the Libertarians of the ability to determine the identity of their standard bearers at the nomination stage, which ability they had as a "minor" party.

Federal courts have consistently held political parties have the right to insist on loyalty to party principles, *Nader v. Schafer*, 417 F.Supp. 837, 847 (D.Conn. 1976), summarily aff'd, 429 U.S. 989 (1976), the right to require a loyalty pledge, *Ray v. Blair*, 343 U.S. 214, 231 (1952),[6] and the right to impose tests on candidates. *Duke v. Smith* 13 F.2d 388, 391 n.3 (11th Cir. 1994). "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

Stated alternatively, the primary election scheme approved in *Munro* favors "minor" political parties only for so long as they remain "minor" political parties. Because of

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[6] *Jones* sets forth the basic constitutional rationale for the Libertarian Party's right to qualify its candidates for the general election, but *Blair* is directly on point and dispositive.

the combined effect of centrist and imposter candidacy the blanket primary system virtually guarantees that all "third" parties will remain "minor" parties and that there can never be a truly vital alternative to the Democratic and Republican Parties in Washington State. Washington's election abstracts, before and after the blanket primary was adopted, support this conclusion.

THERE IS NO CONFLICT WITH THIS COURT OR WITHIN THE NINTH CIRCUIT.

The Grange incorrectly argues that *Arizona Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277 (C.A.9 2003) is in conflict with the Ninth Circuit's decision in *Reed*, because the *Reed* panel required no additional evidence to find that Washington's blanket primary was subject to strict scrutiny, *Reed*, 343 F.3d at 1207, whereas the *Bayless* panel remanded that case to the district court for factual determinations regarding the severity of the constitutional burden on the Arizona Libertarian Party. 351 F.3d at 1282.

The two cases are easily distinguishable. Washington has a blanket primary and Arizona has a semi-closed primary. The *Jones* decision controlled the outcome in *Reed* because both cases related to blanket primaries and *Jones* had already evaluated the impact of the blanket primary in Washington when determining the impact of the blanket primary in California. In *Jones* this court could think of "no heavier burden" upon a political party's associational rights than that imposed by the blanket primary. *Jones*, 530 U.S. at 582. Neither the Grange nor the State of Washington demonstrated to the *Reed* court that Washington's blanket primary was materially different from the California blanket primary invalidated in *Jones*. See, *Reed,* at 1207. Accordingly, the *Reed* court

rightly held Washington's blanket primary was subject to strict scrutiny and that the asserted state interests were insufficient to uphold the law.

On the other hand the *Jones* decision merely informed the *Bayless* decision. The *Bayless* panel recognized it was considering a different, semi-closed primary scheme and noted: "The Supreme Court in *Jones* noted that a system 'in which the voter is limited to one party's ballot' may be 'constitutionally distinct' from the unconstitutional blanket primary. *Id.* at 577 n.8, 120 S.Ct. 2402." *Bayless*, at 1282. Accordingly, the *Bayless* court rightly remanded the case for appropriate factual findings regarding the burden of allowing independent voters to participate in a political party's primary election.

THIS CASE DOES NOT PUT THE FUTURE OF OPEN PRIMARIES IN DOUBT

Pointing to what the Grange perceives as "conflict and uncertainty," Petition at 21, the Grange invites this court to grant review because of "the importance of the issues." Petition at 23, (citing *United States Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995)). This case presents no significant issue not already decided in *Jones*. The *Reed* panel found Washington's blanket primary is not materially different from California's blanket primary, 343 F.3d at 1203, and Washington's asserted state interests were not materially different from California's asserted state interests. See, generally, 343 F.3d at 1204-1207. The panel also found that *Jones* "carefully distinguishes blanket primaries," from open, closed and nonpartisan primary systems, *Reed*, 343 F.3d at 1203, and made no finding or suggestion that *Jones* applied to any system other than blanket primaries.

RES JUDICATA DOES NOT APPLY TO THE LIBERTARIAN PARTY.

The Grange relies on *Anderson v. Milliken,* 59 P.2d 295 (WA 1936) and *Heavey v. Chapman,* 611 P.2d 1256 (WA 1980) to incorrectly allege the doctrine of *res judicata* prevents the Libertarian Party from challenging the blanket primary. The Libertarian Party was not a named party to either prior case[7] and *res judicata* cannot apply unless the Grange shows the Libertarian Party was in privity with the other political parties. *Nevada v. U.S.*, 463 U.S. 110, 103 S.Ct. 2906 (1983). The Grange has never even attempted to show privity between the other two parties and the Libertarian Party. Moreover, the rights at issue in this case are personal rights of the members of the political parties. Where issues of personal liberty are concerned, Washington does not find privity between individuals. *Southcenter Joint Venture v. National Democratic Policy Comm.*, 780 P.2d 1282, 1285 (Wash. 1989).

The Grange points to *Snyder v. Munro*, 106 Wash.2d 380, 721 P.2d 962 (1986) in an attempt to show the Democratic and Republican Parties are in privity. The Libertarian Party was not involved in the *Snyder* case at any level. Neither was the Grange. "The doctrines of res judicata or collateral estoppel do not apply, where the issues and the parties are not the same." *Snyder,* 721 P.2d at 963. The Libertarian Party did not exist in 1935 when *Anderson* was decided. It was a "minor" political party without standing in 1980, when *Heavey* was decided, to challenge the blanket primary for the injuries asserted here.

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[7] Neither was the Grange a party to either prior action.

Even if the Libertarian Party was in privity, the law as to the rights of expressive association has developed significantly since the state court cases were decided. In the years since *Heavey* was decided by the Washington Supreme Court this court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." *Jones*, 120 S.Ct. at 2407. (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989), and *Democratic Party Of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, (1981)). (footnote omitted).

In *Tashjian, v. Republican Party Of Connecticut,* 479 U.S. 208 (1986), and again in *Eu, supra,* this court said "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Id.,* at 227 (quoting *Tashjian,* at 224). In *Jones* this court said it could "think of no heavier burden on a political party's associational freedom" than that presented by the blanket primary, 530 U.S. at 582, and that "the net effect of this scheme – indeed, its avowed purpose – is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." 530 U.S. at 584.

The Grange mistakenly argues the Ninth Circuit misapplied *Montana v. U. S.*, 440 U.S. 147, 99 S.Ct. 970, (1979), because this court found in *Montana* that a prior state Supreme Court decision was binding on the parties. The Grange confuses the result of *Montana* with the principle involved. Contrary to the Grange's contention, this court specifically recognized that "a significant 'change in the legal climate'" would prevent application of the *res judicata* doctrine. *Id.,* 440 U.S. at 161 (quoting

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 606, 68 S.Ct. 715, 92 L.Ed. 898 (1948)).

CONCLUSION

The blanket primary has deprived the Libertarian Party of the ability to deliver its message to the electorate by depriving the Libertarian Party of the ability to select its own standard bearers. The *Reed* decision does not conflict with any holding of this or any other court, and presents no issues not already decided in *Jones*.

There is no compelling reason for this court to grant review.

Dated:

Respectfully submitted,

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